LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
APR 23 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967
No. 1260

WYETH-SCOTT COMPANY, an Ohio Corporation,
Petitioner,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,
Respondent,

DOROTHY MAE DRIGGERS, MARILYN KAY DRIGGERS, and KAREN LEE DRIGGERS, Minors, by DOROTHY MAE DRIGGERS, their Guardian *ad Litem;* DOROTHY MAE DRIGGERS, Administratrix of the Estate of Oscar Driggers, Jr., Deceased; B & B SUPPLY COMPANY, a California Corporation,
Parties in Interest.

On Petition for Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District.

BRIEF OF DOROTHY MAE DRIGGERS IN OPPOSITION TO PETITION FOR CERTIORARI.

HILLEL CHODOS,
9107 Wilshire Boulevard,
Beverly Hills, Calif. 90210,
Attorney for Dorothy Mae Driggers.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

SUBJECT INDEX

	Page
Statement of the Case	1
Question Presented	3
Jurisdiction	3
Argument for Denial of Certiorari	5
Conclusion	10

TABLE OF AUTHORITIES CITED

Cases	Page
Borgward v. Superior Court, 51 Cal. 2d 72, 330 P. 2d 789	3
Cosper v. Smith & Wesson Arms Co., 53 Cal. 2d 77, 346 P. 2d 409	3, 9
Curtis Publishing Co. v. Cassel, 302 F. 2d 132	6
Empire Steel Corp. of Texas, Inc. v. Superior Court, 56 Cal. 2d 823, 17 Cal. Rptr. 150	6
Gill v. Surgitool Incorporated, 256 Adv. Cal. App. 658, 64 Cal. Rptr. 207	6
Hanson v. Denckla, 357 U.S. 235	5, 6
Harry Gill Company v. Superior Court, 238 Cal. App. 2d 666, 48 Cal. Rptr. 93	6
Henry R. Jahn & Son, Inc. v. Superior Court, 49 Cal. 2d 855, 323 P. 2d 437	3
International Shoe Co. v. State of Washington, 326 U.S. 310	5
McGee v. International Life Insurance Co., 355 U.S. 220	5, 6
Rothschild v. Erda, 258 Adv. Cal. App. 859, 66 Cal. Rptr. 209	6
Thomas v. J. C. Penney Co., 186 Cal. App. 2d 223, 8 Cal. Rptr. 721	3

Statutes

California Code of Civil Procedure, Sec. 411 2
California Code of Civil Procedure, Sec. 416.1 3
California Code of Civil Procedure, Sec. 416.3 3
California Corporations Code, Sec. 6501 2
United States Code, Title 28, Sec. 1257(3) 4
United States Constitution, Fourteenth Amendment 3

IN THE

Supreme Court of the United States

October Term, 1967
No. 1260

WYETH-SCOTT COMPANY, an Ohio Corporation,

vs. *Petitioner,*

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES, *Respondent,*

DOROTHY MAE DRIGGERS, MARILYN KAY DRIGGERS, and KAREN LEE DRIGGERS, Minors, by DOROTHY MAE DRIGGERS, their Guardian *ad Litem;* DOROTHY MAE DRIGGERS, Administratrix of the Estate of Oscar Driggers, Jr., Deceased; B & B SUPPLY COMPANY, a California Corporation, *Parties in Interest.*

On Petition for Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District.

BRIEF OF DOROTHY MAE DRIGGERS IN OPPOSITION TO PETITION FOR CERTIORARI.

Statement of the Case.

Dorothy Mae Driggers is the widow of Oscar Driggers, who was killed in a construction accident at Long Beach, California, on April 21, 1966. Mrs. Driggers commenced this action in the Superior Court of Los Angeles County for wrongful death against various persons and firms alleged to be responsible. According to the complaint, the accident was caused by a defec-

tive mechanical device known as a "More Power Puller," which had been purchased by Driggers' employer from B & B Supply Company, and which had been manufactured by Petitioner Wyeth-Scott, an Ohio corporation.

The summons and complaint were served upon Petitioner through California's Secretary of State, pursuant to the procedure for substituted service specified in §411 of the California Code of Civil Procedure, and §6501 of the California Corporations Code. B & B Supply Company, which had also been named by Driggers as a defendant, filed a cross-complaint for indemnity against Petitioner, which cross-complaint was also served upon Petitioner through the Secretary of State.

Petitioner appeared specially in the Superior Court, and moved to quash service of the complaint and cross-complaint for lack of personal jurisdiction, asserting that it was not and had not been "doing business" in California. The motion to quash was supported by affidavits and points and authorities; and counter-affidavits and points and authorities were filed by Driggers and by B & B Supply Company.

Petitioner's affidavits were to the effect that Petitioner was an Ohio corporation which had not formally qualified to do business in California, and that it had no branch offices, warehouses, bank accounts or employees in California. However, it appeared without contradiction from the counter-affidavits that Petitioner had been actively selling its products in California for fifteen years, through B & B Supply Company and other distributors; and that through this device, Petitioner had done a substantial volume of business in

California. After considering the affidavits and hearing the argument, the motion to quash was denied by the Superior Court.

Thereafter, Petitioner sought review of this order in the Court of Appeal and in the Supreme Court of California, pursuant to the procedure outlined in §§416.1 and 416.3 of the California Code of Civil Procedure. Relief was denied summarily by the California appellate courts, neither of which wrote an opinion. This Petition for Certiorari followed.

Question Presented.

The sole question presented by this proceeding is whether the California courts were justified in weighing the affadavits and counter-affidavits filed in connection with the motion to quash, and finding that Petitioner was "doing business" in California to such an extent that the California courts could assert personal jurisdiction over Petitioner, without doing violence to the due process clause of the Fourteenth Amendment.

Jurisdiction.

The decisions of California's appellate courts make it clear that California's long-arm statutes are intended to assert jurisdiction over foreign corporations to the full extent permitted by the due process provisions of the Federal Constitution. See for example:

Cosper v. Smith & Wesson Arms Co., 53 Cal. 2d 77, 346 P. 2d 409;

Borgward v. Superior Court, 51 Cal. 2d 72, 330 P. 2d 789;

Henry R. Jahn & Son, Inc. v. Superior Court, 49 Cal. 2d 855, 323 P. 2d 437;

Thomas v. J. C. Penney Co., 186 Cal. App. 2d 223, 8 Cal. Rptr. 721.

The outer boundaries of the due process clause are, of course, defined by federal law, as interpreted by the decisions of this Court; and in view of Petitioner's claim that the assertion of personal jurisdiction by the California courts in this case is a violation of its right to due process, it must be conceded that a federal question is presented. Accordingly, Petitioner correctly states that jurisdiction is conferred on this Court by the provisions of 28 U.S.C. § 1257(3).

ARGUMENT FOR DENIAL OF CERTIORARI.

The constitutional boundary for the assertion of *in personam* jurisdiction by state courts over foreign corporations was established by this Court some years ago in *International Shoe Co. v. State of Washington,* 326 U.S. 310 (1945). In that case, this Court held that

> "due process requires only that in order to subject a defendant to a judgment *in personam,* if he be not present within the territory of the forum, he has certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" [326 U.S. at 316].

Twelve years later this fundamental principle was reaffirmed in *McGee v. International Life Insurance Co.,* 355 U.S. 220 (1957) and in *Hanson v. Denckla,* 357 U.S. 235 (1958).

In *McGee,* this Court upheld the *in personam* jurisdiction of the California courts over a Texas insurance company; whereas in *Hanson*—decided only six months later—it was held that the Florida courts did not have jurisdiction over certain Delaware trustees. Petitioner professes to be confused by an alleged inconsistency between these latter decisions, and asserts that the constitutional boundaries have somehow been rendered vague and uncertain. According to Petitioner, the time is ripe for this Court to discuss the problem anew, with a view to establishing clear and simple criteria for determining the limits of the long-arm jurisdiction of the several states.

It is respectfully submitted, however, that there is no substantial confusion in the law. On the contrary, the rule of *International Shoe Company v. Washington, supra,* is clear enough; and if it produces different re-

sults in different cases, it is only because the rule is one which must be applied separately to the facts of each case. Indeed, the different results reached in *McGee* and *Hanson, supra,* merely emphasize that the rule is designed to be applied on a case-by-case basis.

As Petitioner apparently acknowledges, the lower federal courts have recognized that every case must be left to its own facts [*Curtis Publishing Co. v. Cassel,* 302 F. 2d 132, 136 (10th Circuit, 1962)], and the California courts have made the same observation [*Empire Steel Corp. of Texas, Inc. v. Superior Court,* 56 Cal. 2d 823, 17 Cal. Rptr. 150; *Harry Gill Company v. Superior Court,* 238 Cal. App. 2d 666, 48 Cal. Rptr. 93].

The published decisions of California's appellate courts make it clear that California is fully cognizant of the Constitutional limitations of its *in personam* jurisdiction, and that it will freely deny jurisdiction to its trial courts when such action is warranted by the facts of a particular case. See, by way of illustration, two recent decisions of the Courts of Appeal of California: *Gill v. Surgitool Incorporated,* 256 Adv. Cal. App. 658, 64 Cal. Rptr. 207. *Rothschild v. Erda,* 258 Adv. Cal. App. 859, 66 Cal. Rptr. 209 (quoting and following the principle enunciated in *Hanson v. Denckla, supra,* 357 U.S. 235).

In any event, even if the law of *in personam* jurisdiction over foreign corporations were fuzzy at the boundary lines, it is respectfully submitted that the case at bench does not provide this Court with an appropriate vehicle for clarifying those boundary lines. Whether the "minimum contacts" rule is construed strictly or liberally; and wherever the line of demarcation may lie between "doing business" in California and "not doing business" in California; the undisputed facts presented

to the trial court amply demonstrate that Petitioner is amenable to the jurisdiction of the California courts in this action.

To be sure, Petitioner is an Ohio corporation which has not formally qualified to do business in California. Admittedly, Petitioner has no branch offices, warehouses, bank accounts, telephone numbers or employees in California. But the record shows that Petitioner has been "doing business" in California on a substantial scale for years, albeit such business has been conducted through intermediaries.

The trial judge had before him the affidavit of Julius Lenz, an officer of Petitioner [Part of Exhibit F to Petition for Writ of Mandate, filed in the California Court of Appeal]. This affidavit contains a lengthy recital of Petitioner's activities in the State of Ohio, but also admits that Petitioner has sold More Power Pullers to B & B Supply Company and "to other business entities in the State of California," and that these sales by Petitioner have been made on the understanding that the More Power Pullers would be resold at retail by the purchasers thereof, obviously to California users. Lenz further admits that, in 1965 and 1966, Petitioner's gross sales in California totalled approximately $19,000.00, very nearly 4% of its total gross volume of sales. Lenz also asserted that all of Petitioner's sales were made on a cash basis, and that it did not extend credit to purchasers in the State of California.

However, the trial judge also had before him the declaration of Irving Blumberg, the president of B & B Supply Company [Exhibit H to Petition for Writ of Mandate]. Mr. Blumberg contradicted Lenz' assertion that sales were made on a cash basis, and stated instead that sales were made on a thirty day credit basis; and in

fact attached a copy of one of Petitioner's invoices to prove it. On this point, the evidence clearly preponderated against Petitioner; and may well have given the trial judge reason to discredit much of Lenz' other testimony. Furthermore, Blumberg's declaration contained considerable additional facts which stand uncontradicted in the record. According to Blumberg, B & B Supply Company has been the distributor of Petitioner's More Power Pullers in Southern California for fifteen years. During this time, Petitioner has sent many of these devices into California for resale to California users; and in fact all of them have been sold to California users. Indeed, in 1965, 1966 and 1967, some 650 of Petitioner's More Power Pullers were purchased by B & B Supply Company and resold to California users; and this does not even include any More Power Pullers distributed by Petitioner through other outlets in California (as suggested by Lenz' affidavit). Blumberg further stated in his declaration that Petitioners supplied B & B Supply Company with brochures describing the More Power Pullers, and encouraging their purchase and use; and stated that these brochures were distributed in California and were utilized by B & B salesmen in distributing the More Power Pullers to the California public. Finally, Blumberg's declaration makes it clear that the Guy F. Atkinson Company (the employer of Oscar Driggers, who was killed in the accident) was a regular purchaser of More Power Pullers; and that it had undoubtedly purchased the very device allegedly responsible for the accident from Petitioner through B & B Supply Company.

In summary, the evidence before the trial court demonstrated that Petitioner has been selling its More Power Pullers in California for fifteen years; that, dur-

ing the last three years, it has sold over 650 More Power Pullers for resale to California users through B & B Supply Company alone, to say nothing of any items sold through other California distributors; that B & B Supply Company, as the distributor of these items, maintains a stock of Pullers and parts; and that, during 1965 and 1966, 4% of Petitioner's gross volume of business was done in California. Under these circumstances, it was clearly reasonable for the trial court to find, as a factual matter, that Petitioner has such "minimum contacts" with California that it did not offend "traditional notions of fair play" to require Petitioner to defend this action, particularly in view of the other circumstances present in the case. These other circumstances are set forth in the declarations of Dorothy Mae Driggers and Eric Julber [Part of Exhibit G to Petition for Writ of Mandate]. These declarations establish that Dorothy Mae Driggers and Oscar Driggers are long-time California residents; that Oscar Driggers was killed in an accident in California, while he was working under a contract of employment made in California; and that all of the witnesses are Californians.

Petitioner contends that it is situated in Ohio, and that it confines its business activities to that state; and asserts that it is not amenable to the personal jurisdiction of the California courts, merely because it does not have full-time employees or agents in California. A similar argument has been presented to, and expressly rejected by, the Supreme Court of California in *Cosper v. Smith & Wesson Arms Co., supra,* 53 Cal. 2d 77, 346 P. 2d 409. In that case, too, Smith & Wesson conducted its California activities through an "independent" factory representative or distributor, who was not directly an employee of the company. The Court rested

its decision essentially on the obvious fact that Smith & Wesson had been selling its product in this state for many years to Californians; had been reaping profits and other advantages from the substantial volume of business which it did in this state; and had knowingly exposed countless residents of California to the risk of injury from such of its products as might have been defectively designed or manufactured. Under these circumstances, the Court had no difficulty in holding that, when a California resident bought a Smith & Wesson product in California, and was injured here as a result of that product's defective design and manufacture, he was entitled to proceed against Smith & Wesson in the California courts to recover the damages proximately caused by Smith & Wesson's business activities in this state. It is respectfully submitted that Oscar Driggers was in the identical situation; that Petitioner has been exploiting the lucrative California market for its products actively, continuously and in substantial volume for many years; that the trial court's order denying Petitioner's motion to quash service of summons was amply supported by the facts and compelled by law; and that there are no considerations of law, of equity, or of due process which would warrant the granting of certiorari or a reversal of that decision by this Court.

Conclusion.

For all of the foregoing reasons, the Petition for Certiorari should be denied.

Dated: April 22, 1968.

Respectfully submitted,

HILLEL CHODOS,
Attorney for Dorothy Mae Driggers.